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REPLY TO

January 9, 1993

RECEIVED

JAN 11 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: **MM Docket No. 92-263 (Consumer Protection and Customer Service)**

Dear Sir or Madam:

Enclosed for filing in the above referenced docket, please find an original plus nine copies of the comments of the West Michigan Communities. An additional copy is provided as well which we would appreciate your time stamping and returning to the undersigned at 171 Monroe Avenue, N.W., Grand Rapids, Michigan 49503.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

John W. Pestle

JWP/mb
Enclosures

cc: Customer Service Rulemaking file (w/encl.)
Chron file (w/encl.)

No. of Copies rec'd 0+9
List A B C D E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 92-541
	)	
Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-263
	)	
Consumer Protection and Customer Service	)	

To the Commission:

WEST MICHIGAN COMMUNITIES
COMMENTS ON
CONSUMER PROTECTION AND CUSTOMER SERVICE

Pursuant to Sections 1.414 and 1.419 of the Commission's Rules and the Commission's December 10, 1992 Notice of Proposed Rule Making ("NPRM"), the City of Walker, Ada Township, City of Kalamazoo and Grand Rapids Charter Township ("West Michigan Communities") respectfully submit their comments to encourage the Commission to adopt rules which allow for a meaningful local role on consumer protection and customer service in furtherance of the objective of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"or "1992 Act") of providing better protections for cable subscribers than previously existed.

West Michigan Communities respectfully suggest that the statements and concern expressed by the Commission about the inability of municipalities to unilaterally adopt customer service legislation without violating the 1984 Cable Act, the 1992 Act or

existing franchises[1] is legally incorrect: Prior to the 1992 Act municipalities had the ability under the police power to unilaterally adopt cable customer service legislation so as to protect their citizens without violating either the 1984 Act or cable franchises. As is set forth below, the City of Kalamazoo did exactly that in 1990 and a Federal Judge ruled against the cable operator's legal challenge to Kalamazoo's legislation which raised issues similar to those discussed in the NPRM.

The 1992 Act was intended to clarify and expand municipalities' rights in this regard--hence under the 1992 Act municipalities can clearly adopt customer service and consumer protection legislation aimed specifically at cable matters at any time. The Commission's rulemaking should so state and be drafted accordingly.

West Michigan Communities also respectfully suggest certain changes in the NCTA rules before they are adopted as the Federal customer service minimums.

Finally, West Michigan Communities state that the Federal minimum customer service standards must be self-executing.

I. WEST MICHIGAN COMMUNITIES' REPRESENTATIVES

All communications and correspondence relating to this matter should be directed to the following representatives of West Michigan Communities:

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[1] For simplicity, the term "franchise" is used herein as defined in the 1984 Federal Cable Act to mean the authorization given the cable operator, whether denominated as a franchise, license, consent agreement or otherwise.

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II. WEST MICHIGAN COMMUNITIES' INTERESTS IN THIS MATTER

Each West Michigan Community is the entity which grants authorization in the form of franchises, consent agreements or otherwise for a cable system to operate in its community (in Michigan counties and the state Public Service Commission play no role in this regard). Each community has had such agreements with a cable operator for some time. Kalamazoo is currently served by Cablevision Systems Corporation, a large multiple system operator which serves 3% of all cable households nationwide. Walker, Ada and Grand Rapids Township are currently served by Tele-Communications, Inc. ("TCI").

In order to protect its residents, each community is concerned that under the Act the Commission adopt meaningful Federal minimum customer service standards that are self-executing, and that the Commission recognize that as a matter of law municipalities at any

time may adopt and enforce different or more stringent local customer service standards.

The City of Kalamazoo is particularly concerned in this regard because it experienced a major deterioration in customer service after Cablevision Systems purchased its cable system, to the point where Kalamazoo was forced to adopt a cable television consumer protection and customer service ordinance 2 years ago to turn matters around. Kalamazoo then successfully defended its ordinance against a court challenge by Cablevision Systems, and customer service has since improved.

Kalamazoo specifically brought its experience to the attention of Michigan Congressmen Howard Wolpe, John Dingell and Fred Upton (the latter two of whom are on the House Energy and Commerce Committee; Kalamazoo is in Congressman Upton's district) to support amendments to the Act which would improve customer service by preventing the kinds of legal challenges Kalamazoo had experienced. The amendments would do so by clarifying and confirming the ability of Kalamazoo and all municipalities to adopt and enforce cable customer service ordinances (whether styled as cable customer service ordinances, cable consumer protection ordinances, or otherwise) during the term of a cable franchise. Such amendments were adopted and became part of the Act. Act § 632(a) and (c).

Kalamazoo files these comments in continued support of such amendments so that it and communities nationwide have clear authority to adopt consumer protection ordinances at any time so as to protect their residents. Based on its experience, Kalamazoo

believes that once cable operators accept that communities can unilaterally adopt specific, local cable customer service standards that this may improve customer service: Operators will address problems and enforce adequate standards themselves because they know that if they don't, the municipality will do it for them.

The City of Walker and the Townships of Ada and Grand Rapids support Kalamazoo's position so that they may adequately protect their residents if the need arises. These three communities are concerned in this regard because TCI recently acquired the system serving their communities, following which TCI laid off some of the system's employees and undertook economy moves. These three communities have some concern that their levels of customer service could decline to unacceptable levels as a result. In fairness to TCI this has not yet occurred.

III. WEST MICHIGAN COMMUNITIES' COMMENTS

A. Kalamazoo Federal Court Decision: The following is a brief description of the background to and Federal District Court decision in Cablevision of Michigan v City of Kalamazoo, Case No. 4:90-CV-170 (W.D. Mich., Dec. 20, 1990) (Ruling Denying Temporary Restraining Order and Preliminary Injunction), (Enslen, J.). A copy of the decision is attached as Exhibit 1 and the Commission is encouraged to read it as it is short, clear and to the point. It goes into more detail on some of the facts set forth below.

After the cable system serving Kalamazoo was purchased by Cablevision Systems from a local broadcaster, customer service declined and complaints increased. The City responded in 1990 by

looking into the situation, and after various preliminary steps investigated alternate customer service standards and held a public hearing on customer service. These steps then lead to the City adopting a "Cable Consumer Protection and Customer Service Ordinance" which as its title suggests solely addressed cable matters. This ordinance was different from and more stringent than the customer service provisions contained in the franchise which Cablevision Systems had assumed when it purchased the system from the prior operator.

Cablevision Systems basically contended that Section 632 of the Cable Act prevented Kalamazoo from adopting such an ordinance, that the ordinance violated its franchise and that it was an unconstitutional impairment of contract and filed suit in Federal Court for a temporary restraining order and injunction before the ordinance went into effect. Cablevision System's contentions were (a) the same as the statement in ¶ 6 of the NPRM -- that under the 1984 Cable Act municipalities could impose customer service requirements only at franchise renewal, and (b) similar to the concern expressed in ¶ 7 of the NPRM about municipalities unilaterally imposing new customer service requirements different from those in existing franchises.

A hearing was held on Cablevision Systems' request for a temporary restraining order and preliminary injunction on December 20, 1990 resulting in rulings as follows: First, the Court ruled that far from <u>preventing</u> the City from adopting consumer protection or customer service legislation specifically

related to cable (or only allowing such ordinances of "general applicability"), Section 632 of the 1984 Cable Act expressly allowed such legislation:

> "I find nothing in the [1984 Cable] Act that supports a finding that this legislation is inconsistent with the Act. As a matter of fact, the Act explicitly provides that the City retains such power." Exhibit 1 at page 19, lines 12-15 (citation to House Committee Report comments on Section 632 of the Act as reprinted in U.S. Congressional Code and Administrative News omitted). See also Exhibit 1 at pages 20-21.

Second, the Court ruled that the ordinance was not a breach of Cablevision System's franchise or consent agreement with the City:

> "The agreement specifically provides that the city retains its police powers. The ordinance represents legislation enacted to benefit the public welfare.
> ...
> [T]he ordinance reads to me like a reasonable exercise of police powers in response to dissatisfaction represented at the public hearing and represented by the numbers of telephone calls...to the customer service department." Id. at page 13, lines 13-16; page 16, lines 7-12.

The opinion goes on to indicate that because there was no breach of the agreement, there was no unconstitutional impairment of Cablevision System's agreement and denies the request for a temporary restraining order and preliminary injunction.

Finally the opinion makes the basic point that even if the agreement purported to contract away the City's police powers (in exchange, for example, for the customer service standards in the agreement) that these powers cannot be bargained away. Id. pages 22-23. This is related to the fundamental point that no legislative body can contract away such powers--This Commission,

Congress, state legislatures and municipalities cannot pass laws or enter into contracts that prevent a future Commission, Congress, etc. from adopting legislation appropriate to the circumstances it then faces. So even if cable franchises are silent on reserving such police powers, the municipality retains the right to adopt appropriate customer service legislation if necessary to protect its residents.

Following this decision the parties stipulated to dismiss the case, and the ordinance remains in effect today.

This decision shows how even prior to the 1992 Act several matters where the NPRM expresses concern or requested comments have been resolved in favor of cable subscribers. It shows that the NPRM's statement that under the 1984 Act municipalities could not unilaterally adopt cable customer service standards is incorrect. The 1992 Act was intended to expand municipalities' rights on customer service matters. Thus under the 1992 Act municipalities can clearly adopt customer service and consumer protection legislation aimed specifically at cable matters at any time. The Commission's rulemaking should so state and be drafted accordingly.

B. Section 632: As noted in the Act and in the NPRM, Congress found substantial problems with cable customer service which led to Section 8 of the Act which amends Section 632 of the Communications Act. The amendments give enhanced authority to local municipalities to address customer service issues. As the NPRM notes, it is "unlikely that Congress intended for there to be no changes in customer service requirements prior to the expiration

of each current franchise agreement". NPRM ¶ 7. And in response to the Commission's question in footnote 11, Congress' goal of improving customer service in a timely fashion will be thwarted if municipalities cannot act on customer service matters prior to franchise renewal.

The problems and concerns raised by the Commission in paragraphs 5 through 7 of the NPRM are fairly easily answered as follows.

As shown by the decision in the Kalamazoo case, prior to the 1992 Act municipalities could unilaterally adopt specific cable customer service and consumer protection ordinances during the term of a cable franchise. In fairness, however, the 1984 Act was not as clear on this point as perhaps it should have been, such that cable operators could sometimes deter proposed local customer service ordinances by threatening litigation.

The Act deals with this by clarifying and confirming the result (if not the detailed logic) of the Kalamazoo decision as follows.

Section 632(c) formerly stated that no state or municipality was prohibited "from enacting or enforcing any consumer protection law, to the extent not inconsistent with this title." As indicated above, the Kalamazoo decision held this allows municipalities to unilaterally adopt cable consumer protection and customer service requirements.

Congress changed Section 632(a) of the Act from stating that a municipality "may require as part of a franchise . . . provisions

for enforcement of . . . customer service requirements of the cable operator" to the simple declarative statement that now

> "A franchising authority may establish and enforce. . . customer service requirements of the cable operator."

Individually (and collectively with the changes to Section 632(c)) this provision confirms the authority of municipalities after December 3, 1992 to unilaterally adopt and enforce customer service requirements. As was held in the Kalamazoo case, as a valid legislative exercise of the police power, such actions do not violate the Contract Clause of the Constitution. Any credence the Commission gives to constitutional arguments against local municipalities' authority to act on customer service matters under the Act tends to also undercut the Commission's authority to issue minimum Federal customer service standards under Section 632(b).

In this regard, the Commission should be aware that constitutional objections were historically made many times over in the early part of this century by electric, telephone and gas utilities; railroad companies; grain elevators; and other businesses with a significant impact on the public as they became subject to regulation. See e.g., Stoddard, The Evolution and Devolution of Public Utility Law, 32 Mich. L. Rev. 577, 578 ff (1934). Such arguments have long been rejected by the courts for such (often monopolistic) businesses affected with the public interest and are equally invalid here.

Section 632(c) thus confirms, amplifies and reinforces Section 632(a). The suggestion in paragraph 5 of the NPRM that Section

632(c) should be interpreted to only allow "generally applicable" local legislation should be rejected.

Specifically, a "general applicability" gloss is only that: It is not in the language of either the 1984 Act or 1992 Act although it is typically argued by cable operators to attempt to evade meaningful local customer service regulation. The Kalamazoo decision rejects this interpretation.

The failure of Congress to add this gloss to the Act in the 1992 legislative process itself shows that it was not intended. And as is well known, most utilities, such as electric, telephone, and gas are regulated at the state level -- not at the local level, including on customer service matters. Thus, the suggestion apparently implicit in the gloss "of general applicability" i.e., that municipalities could adopt customer service standards for cable only if they applied equally to other utilities is incorrect. Congress did not intend a nullity when it acted to clarify and strengthen municipalities' hand in this regard.

The correct legal analysis is that communities can unilaterally adopt local cable customer service standards at any time. They can do so even if this imposes customer service standards that are different from those contained in a signed franchise or consent agreement. Such was the specific ruling of the Kalamazoo case under the 1984 Act. Exhibit 1, page 19, lines 4-8. It is absolutely clear that in the 1992 Act Congress did not intend to cut back on municipalities' rights in this regard.

As a practical matter, West Michigan Communities would note that typically communities only adopt ordinances and go to the substantial time and effort involved in drafting and adopting them if all other avenues have failed. See, e.g., Exhibit 1, page 4, lines 1-4, Specifically, if there is a customer service problem, the cable operator is going to know about it in the first instance and may (and hopefully will) itself resolve problems.

The municipality will begin to become involved only if the cable operator fails to act. See, e.g., Exhibit 1, page 3, lines 18-25 and page 4, lines 1-4. Often cable operators are asked to meet with municipal administrators, are asked to meet with citizens, or are asked to explain their positions at City Council meetings before official action is taken.

Thus the 1992 Act confirms and clarifies a municipality's ability to unilaterally adopt cable customer service standards at any time. The Commission should be aware that as a practical matter, most problems are resolved short of this. And as noted above, once cable operators realize that municipalities have the authority to act unilaterally on cable customer service matters, this gives operators a powerful incentive to do a good job and promptly address problems that may arise so as to prevent the need for municipal action.

C. Federal Standards Should Be Self-Executing: The Commission's customer services standards should be self-executing. Otherwise they will not fulfill the intent of Congress in providing

an effective minimum standard for cable customer service nationwide. This is for several reasons.

For small communities, the burden is significant for them to become informed about the standards adopted by this Commission, consider them and adopt them, especially if faced with intransigence or opposition from the local cable company. In this regard, this Commission should recognize that in many of the smaller and more rural communities of the nation there are few (and in some cases no) full-time paid municipal officials. And the funds are simply not there to readily hire specialized firms or consultants with the requisite cable knowledge. Thus, in too many instances for small communities the reality will be that the Federal standards will not be adopted unless this Commission makes them self-executing.

Second, having uniform Federal standards in force nationwide will help customer service on cable matters generally. That is because every cable operator knows that everywhere it has to meet Federal standards. Otherwise, there will be backsliding and the tendency by some cable operators to "shrug off" the standards on the excuse that they do not necessarily apply everywhere.

Third, from a historical perspective, unless the Commission makes these standards self-executing they will be little different from the non-mandatory recommendations related to customer service which the Commission formerly promulgated for consideration by municipalities in the franchising process. These recommendations relating to customer service (which were deleted in 1985) in

general suggested that on customer service franchises specify a complaint resolution procedure; require the cable operator to maintain a local office; designate a person with the municipality responsible for cable complaints; and give subscribers notice of the procedure for reporting and resolving complaints. See, e.g., 47 CFR § 76.31 (note)(1982)(deleted 1985).

Thus, before the 1992 Act, this Commission had promulgated recommendations on customer service matters which communities could adopt or reject as they pleased. Given the clear purpose of the 1992 Act, Congress clearly intended something more from this Commission than a mere set of Federal customer service recommendations for communities to consider. Congress intended mandatory (i.e., self-executing) Federal minimum standards that automatically set a floor on customer service in all municipalities.

D. Comments on Specific NCTA Standards: West Michigan Communities respectfully suggest that the following appointment window alternatives be added to the standards adopted by the Commission. These comments specifically relate to Item 2.C of the NCTA standards.

In general, many communities have found that their cable operators offer the option of "call to meet" and "first call of the day" (the latter on a first come, first serve basis) to accommodate customers desiring a relatively specific time for an appointment.

On "first call of the day", cable companies (and for that matter most utilities) provide an option for customers desiring a

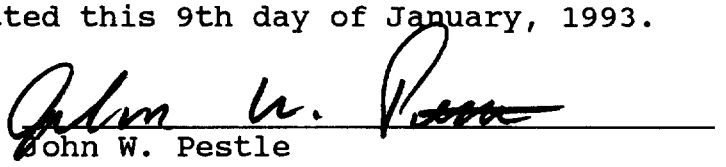
specific time for service of opting to be the first call of the day. Such appointments are done on a first come, first serve basis and give customers the choice of a time certain that might be some time off versus a quicker appointment but at a less certain time. First call of the day reasonably accommodates the needs of both the customer and the cable operator. Due to its wide use, it should be promulgated by this Commission in its minimum standards.

Similarly, "call to meet" should also be provided for customers as an option. Under this approach, typically as a service person is finishing the prior job, he or she calls the next customer (usually at the next customer's place of work) so that the customer and service person can then meet at the customer's house at the appropriate time. Again, this provides a reasonable accommodation of the needs of both the subscriber and the cable operator and should be included by this Commission in its minimum rules.

West Michigan Communities would suggest a number of other changes in the minimum standards as well but limit themselves to the preceding two which will be easy for the Commission to adopt and implement.

E. Support NATOA Comments: West Michigan Communities support the positions taken by the National Association of Telecommunication Officers and Advisors (NATOA) in its comments in this docket.

Respectfully submitted this 9th day of January, 1993.



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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

....

CABLEVISION OF MICHIGAN, INC. a Michigan Corporation.	Docket No. 4:90-CV-170
Plaintiffs.	
VS.	DECEMBER 20, 1990.
CITY OF KALAMAZOO, a Municipal Corporation,	Kalamazoo, Michigan.
Defendant.	

RULING, TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Before: HONORABLE RICHARD A. ENSLEN,
United States District Judge.

PRESENT FOR:

PLAINTIFF CABLEVISION OF MICHIGAN, INC.:	Kreis, Enderle, Callander & Hudgins By: DOUGLAS L. CALLANDER, ESQ. ALAN G. ENDERLE, ESQ. 800 Comerica Building Kalamazoo, Michigan 49007
DEFENDANT, the CITY of KALAMAZOO:	Office of the City Attorney by: ROBERT H. CINABRO, ESQ. City Attorney, and MATTHEW O. MORRIS, ESQ. Assistant City Attorney 241 W. South Street Kalamazoo, Michigan 49007-4796

(Also present as identified: Donald P. Curley with Plaintiff; and Joan Burke, with Defendant City.)

Official Ct.Reporter: Jarratt W. Martin,
U.S.District Ct., P.O.Bx 81, Court Station,
Kalamazoo, Mi. 49005-0081 Ph. (344-5235)

EXHIBIT 1

DECEMBER 20, 1990 (6:15 p.m.) KALAMAZOO, MICHIGAN.

THE COURT: An interesting discussion. Cablevision comes to this court with a complaint yesterday seeking a temporary restraining order, a preliminary injunction, and finally a permanent injunction, declaratory judgment, and so forth, and, currently, seeking to enjoin the, quote, "operation enforcement and implementation" of Kalamazoo City Ordinance Number 1503 promulgated by the city commission on December 10th, 1990.

Pursuant to the city charter, paragraph 13, the ordinance should go into effect from and after ten days from the date of the passage; and the city now states, and there is a stipulation, that it would go into effect Friday, December 21st, 1990, and not on December 20th as originally Cablevision had alleged.

Cablevision argues that the ordinance breaches its agreement with the city, secondly, is in violation of the Cable Communications Act, better known to me at least at 47 U.S.C. Section 521, et sec., and, thirdly, is a violation of the Contract Clause, Article I, Section 10 of the United States Constitution, thus constituting a taking of property without due process of law; and seeks relief under Section 1983 because there is a constitutional provision that has been alleged or two constitutional provisions alleged.

The city responds that the ordinance is a

consumer protection ordinance that is enacted specifically under its police powers explicitly reserved by the agreement and specifically authorized by 47 U.S.C. Section 552(c) of 1984.

Kalamazoo City and Cablevision entered, sort of entered a consent agreement -- that is not true. What happened is the city of Kalamazoo and Fetzer Broadcasting Company entered into a consent agreement regarding cable services, and there was an assumption by Cablevision, the plaintiff here, of that agreement. The original agreement I believe was in 1981. I think in April. Cablevision then purchased Fetzer's interests and entered into this assumption agreement pursuant to which it assumed the rights and the responsibilities of Fetzer.

Section 5(C)(1)) of the agreement explicitly provides that it, quote, "shall not preclude the city from exercising any of its police powers."

In June of 1990, the city had a public hearing at which allegedly 45 people attended. There is an argument about how many people attended and whether they were commissioners or citizens or city attorneys or whatever; and the 45 number comes from Joan Burke's affidavit, page 3.

Cablevision states, and I haven't heard anybody dispute it, that 19 people -- however many might have been in attendance -- spoke at the hearing. As a result of

the hearing, the city of Kalamazoo and plaintiff attempted to reach an agreement on revised customer service standards; and the two sides could not reach an agreement, hence, the ordinance and the argument before me.

The plaintiff, in short, argues a breach of contract, the unilateral breach of contract, a violation of the Act, and violation of the Article I, Section 10 impairment of contract clause of the Constitution, and a taking without due process in order to justify its complaint and its immediate relief sought.

Rule 65(b) provides in relevant part that this a temporary restraining order can be issued without notice to the opposing party only if, one, it clearly appears from specific facts that immediate and irreparable injury will result before the adverse party can be heard and, two, the applicant certifies to the court in writing the efforts made to give the notice and the reasons supporting the claim that notice cannot be required or should not be required. That is not the situation here.

Let me state that a different way. If that were the situation, if the plaintiff sought a temporary restraining order without notice to the city, then the plaintiff would only have to establish irreparable injury, and the Court need look at nothing else; but if the Court is considering a matter in which the other side did get notice,

as in this case, and considers it under the preliminary injunction standard, then the court has to add the other three well-known factors before granting a preliminary injunction.

I asked the lawyers at the outset if they wanted me to consider this matter being heard here for preliminary injunctive purposes, and I got confused answers from both, which is sort of a lawyer's way to keep his foot in the door. But the court believes at this stage at least the court should apply all four, considering the relief sought on the basis of the information that I have received both as to a temporary restraining order and as to a preliminary injunction.

Rule 65(b) makes it clear that the potentially drastic consequences of a restraining order mandate a careful consideration by a trial court faced with such a request. The issuance of the order is according to all law that I know within the discretion of the trial court. A court deciding whether to grant a temporary restraining order should be assured that the movant has produced compelling evidence of irreparable and imminent injury, and that the movant has exhausted reasonable efforts to give the adverse party notice -- not required here because the plaintiff did give the adverse party notice, and the adverse

The court may also, and in this case should in my opinion, consider other factors, including the likelihood of success on the merits, the harm to the nonmoving party, and the public interest -- for the reasons that I have cited before -- because I believe that I have in front of me everything that I am going to have on the day before the ordinance passes to decide whether or not I should or should not grant a temporary restraining order and a preliminary injunction.

While there may be no set definition of irreparable injury, there are characteristics which aid me in determining whether irreparable injury exists. Quote. "The moving party must demonstrate a noncompensable injury, for which there is no legal measure of damages, or none that can be determined with a sufficient degree of certainty. The injury must be certain and it must be great. It must be actual. It must not be merely theoretical."

That is a quote with a lot of ellipsis from Merrill, Lynch, Pierce, Fenner & Smith vs. E.F. Hutton and it is found at 403 F. Supp. 336. The quote comes from 343. That is from the Eastern District of Michigan in 1985 with numerous citations, all of which I omit.

As far as the Sixth Circuit is concerned, see Detroit Newspaper Publishers Association vs. Detroit Typographical Union No. 18, 471 Fed. 2nd 872, 877 from the

Sixth Circuit in 1972, holding, as I understand, that the newspaper publishers' mere allegations of a member's loss of confidence in a union can never be irreparable harm; and showing that a union is in danger of losing bargaining representative status, or suffering loss of membership, may however constitute irreparable harm.

A definition of irreparable injury is also cited in this circuit, in this district, in City of Benton Harbor vs. Richardson, 429 F.Supp. 1096 in 1977. The motion for temporary restraining order can be viewed as a motion for preliminary injunction if the opposing party is given notice and is given an opportunity to be heard. Here as I have said now for the third time, the opposing party has been given notice, and had an opportunity to be heard and in fact has been heard.

A preliminary injunction is also appropriate when necessary to maintain the status quo pending the outcome of proceedings. See University of Texas vs. Camenisch, 451 U. S. 390, 395in 1981. Whether to issue a preliminary injunction again should be, and I understand is, within the discretion of the district court, and is reviewed by the circuit court for abuse of discretion. So says the circuit court of my circuit in Forry vs. Neundorfer,, 837 Fed. 2nd, 259 at 262 in 1988. The district court findings of fact according to Forry are upheld unless clearly erroneous.

In determining whether to issue a preliminary injunction, I now leave the simple standard of likely irreparable harm, to the four standards of likelihood of success on the merits, the irreparable injury which I have also previously spoken about, the possibility of substantial harm to others if the injunction is issued, and whether the public interest would be served by issuing a preliminary injunction.

See Christian Schmidt Brewing vs. Heilman Brewing, 753 Fed. 2nd, 1354, at 1356 from the Sixth Circuit, certiorari denied at 469 U. S. 1200. The Sixth Circuit cautions over and over again that these factors should not be viewed as prerequisites to relief but rather as balancing factors. I don't know how many times the court said that, but it said it in in re Delorean Motor Company, a well-known case, and in 1985, at 775 Fed. 2nd 1233.

With regard to the question of irreparable harm, the one that is the only standard that I have to look at on the T/R/O, the plaintiff argues that -- actually, I didn't understand the plaintiff's argument until today when he argued in the courtroom. When I read the briefs, my problem with his request was that everything that he cited as a potential damage was readily ascertainable in dollars. Those things would include hiring additional staff, buying additional equipment, paying sanctions to the city for